IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NO._____

L. C. PRICHARD,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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L. C. Prichard prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on December 19, 1946 (order denying motion for a rehearing entered January 22, 1947), affirming the orders and judgments of the District Court of the United States for the Northern District of Georgia which overruled petitioner's motions for a judgment of acquittal.

ORDERS AND JUDGMENTS BELOW

The order and judgment of the court overruling petitioner's motions for a judgment of acquittal appears in

the record at pp. 75, 92. The opinion of the Circuit Court of Appeals appears in the record at p. 103.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 19, 1946 (R. 104), and the order denying a rehearing was entered January 22, 1947 (R. 107). The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was the evidence sufficient to authorize the conviction of petitioner?

STATUTE INVOLVED

The statute involved is Sec. 88 of Title 18, U. S. C.; Criminal Code, Sec. 37; Revised Statute, Sec. 5440, and will be found in the Appendix, infra, p. 10.

STATEMENT

Petitioner was indicted at the November Term 1944 by a United States Grand Jury in and for the Newnan Division of the Northern District of Georgia. The indictment only contained one count and charged a conspiracy to violate the various provisions of the Internal Revenue Laws. Petitioner went to trial on April 4, 1946 and on April 5, 1946 the jury returned a verdict finding him guilty as charged. On April 10, 1946 the court committed petitioner to the custody of the Attorney General for a period of eighteen months (R. 18).

The pertinent facts, as disclosed by the evidence, are

substantially as follows:

Petitioner was jointly indicted with five other persons. All of the defendants were present and went to trial except one. The court entered a judgment of acquittal for Corbett Wilson Prichard (R. 76). The jury found the other defendants who were on trial guilty. The evidence upon which petitioner was convicted was entirely circumstantial. The evidence focused around a distillery in Haralson County, Georgia and around another distillery located in Douglas County, Georgia. Petitioner was never seen at either one of these distilleries and there is no evidence of probative value to connect him with these distilleries or with any defendants or co-conspirators. Petitioner was not shown to have known any of said convicted parties except Ernest Pruitt who took the stand and absolved petitioner of any blame in the case. The government obtained petitioner's conviction on purely suspicious circumstances which were refuted by direct and positive testimony of Ernest Pruitt.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States did not err in refusing to grant petitioner's motion for a judgment of acquittal based on the ground that the evidence was insufficient to warrant his conviction.

2. In not reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The question involved is whether the evidence was sufficient to warrant the conviction of petitioner.

Manifestly, the evidence (which was purely circumstantial) is as consistent with innocence as it is with guilt. The few circumstances which furnished the basis of petitioner's conviction amount to nothing more than conjecture and speculation. These circumstances do not point conclusively to his guilt. He was never seen at either one of the distilleries. No association is shown between petitioner and the other alleged conspirators, except Pruitt had worked on petitioner's farm prior to the distilling operations. E. B. Gray testified that he saw one of the Prichards with a load of syrup, but was not certain which one. Willie Prichard, a brother of the petitioner, testified that it was he who was hauling the syrup. This load of syrup was never shown to have any connection with the distilling operations. Ernest Pruitt testified positively concerning the suspicious circumstances lodged against petitioner. Pruitt assumed full responsibility for the distilling operations, and absolved petitioner of any responsibility and of any participation. No attempt was made to impeach Pruitt.

It is a well known principle of law that a conviction is not authorized where the evidence is as consistent with innocence as it is with guilt.

The Fifth Circuit Court of Appeals has held:

> "Where circumstantial evidence is relied on, circumstances proved must not only point to guilt, but must be inconsistent with innocence."
>
> *De Luca vs. United States*
> 298 F. 412 (4) (5 CCA)

The Fifth Circuit Court of Appeals also held in a very recent case:

> "Where circumstantial evidence is relied upon to

sustain a conviction, the inferences that may be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence."

Strickland vs. United States
155 F. (2d) 167 (1) (5 CCA)

The same thing was held in the following cases:

Candler vs. United States
146 F. (2d) 424 (4) (5 CCA)

Wright vs. United States
227 F. 855 (8 CCA)

The prosecution must prevail on the strength of its own case and not on the weakness of that of the defendant.

United States vs. Laffman
152 F. (2d) 393 (2) (3 CCA)

United States vs. Bennett
152 F. (2d) 342 (4) (2 CCA)

Wright vs. United States
227 F. 855 (Supra)

The mere presence of a person at or near a distillery is not a sufficient circumstance to authorize a conviction.

The Fifth Circuit Court of Appeals has also held:

"The mere presence of Copeland at the still that was raided would not be sufficient to show that he was either proprietor of or engaged in operating the still."

Copeland vs. United States
90 F. (2d) 78, 80 (5 CCA)

The Third Circuit Court of Appeals has held:

"Evidence that defendants were at or near premises where a still was in operation, and that they

had in their possession some sandwiches, old clothes, and a hydrometer of the type used in testing the specific gravity of mash or alcohol from mash held insufficient to sustain conviction for possession of unregistered still for the manufacture of mash."

Girgenti vs. United States
81 F. (2d) 741 (3 CCA)

This court (3 CCA) also held:

"Evidence that the defendant was at, or near an illicit still, will not in itself justify a conviction."

Grunwald vs. United States
94 F. (2d) 952 (3) (3 CCA)

The Fifth Circuit Court of Appeals in a case charging a conspiracy held:

"Circumstances which merely raise suspicion or give room for conjecture, are not sufficient evidence of guilt. Wharton, on evidence, p. 1532. A conviction resting on them alone cannot stand."

Kassin vs. United States
87 F. (2d) 183, 184 (4) (5 CCA)

The Sixth Circuit Court of Appeals held the same.

Dennert vs. United States
147 F. (2d) 286 (3) (6 CCA)

Guilty knowledge of an illegal transaction is not sufficient to authorize a conviction.

Mazurosky vs. United States
100 F. (2d) 958,961 (9 CCA)
citing the Copeland case, supra.

The Second Court of Appeals has stated the rule cogently:

"There is no magic about a count charging a conspiracy. It is simply an accusation of a distinct crime, and evidence in support of it must be so clear and convincing as to leave no reasonable doubt."

United States vs. Silva
131 F. (2d) 247, 249 (2 CCA)

See also

Moss vs. United States
132 F. (2d) 875, 876 (16) (6 CCA)

Philyaw vs. United States
29 F. (2d) 225 (8 CCA)

Inferences arising from circumstances cannot be substituted for circumstances to prove guilt.

Gerson vs. United States
25 F. (2d) 49, 51 (18) (8 CCA)

See also

Shannabarger vs. United States
99 F. (2d) 957 (4 and 5) (8 CCA)

The proximity of a still to a defendant's farm, and the fact that he rode up to the distillery while it was being raided, and a remark was made by one of the operators about the defendant's horse, was insufficient.

Reavis vs. United States
93 F. (2d) 307 (5) (10 CCA)

Mere suspicion and conjecture are insufficient to warrant inference of guilt.

Graceffo vs. United States
46 F. (2d) 852 (3 CCA)

The testimony of Ernest Pruitt clearly explained and refuted each one of the circumstances which raised a

suspicion that the petitioner might have been guilty of the acts charged in the indictment. He testified that he and Rube Reeves owned the distilleries; that petitioner had no interest in them; that petitioner was not at the distillery in Haralson County early in the morning on the day of the arrests; that Rube Reeves was the third man who agreed to go after breakfast; that he (Pruitt) purchased the cotton that was used in caulking the distillery; that he (Pruitt) paid Argo $65.00 for the cow, and that he obtained the money from Rube Reeves; that the petitioner did not furnish any material used in the manufacture of liquor; and that petitioner was in no way connected with any of the transactions. This testimony was not disputed or contradicted. No effort was made to impeach Pruitt. Therefore Pruitt's testimony must be taken as true. It must be believed. The jury had no right to disregard it.

The Tenth Circuit Court of Appeals has held:

> "Generally, where unimpeached witnesses testify positively to a fact and are not contradicted, their testimony should under ordinary circumstances be credited and have the effect of overcoming presumption."
>
> *Rosenberg vs. Baum*
> 153 F. (2d) 10 (6) (10 CCA)

The Eighth Circuit Court of Appeals has held:

> "Testimony of witnesses whose credibility was not questioned, and was not impeached or contradicted cannot be disregarded."
>
> *San Francisco et al vs. Industrial et al*
> 152 F. (2d) 532 (8 CCA)

The Fifth Circuit Court of Appeals has adopted this rule of law.

Mutual Life Insurance Co. vs. Sargent
51 F. (2d) 4 (7) (5 CCA) and citations at p. 6

Alabama T. & T. Co. vs. Millsap
71 F. (2d) 518 (5), 520 (5 CCA)

Sutton vs. United States
131 F. (2d) 108

In conclusion, we respectfully submit that the evidence introduced by the Government merely raised conjecture, surmise and speculation. It did not point conclusively to petitioner's guilt. The inferences based upon this unsatisfactory evidence had no probative value but even so, they were fully explained by Ernest Pruitt, who was in possession of the true facts. The judgment should be reversed.

Respectfully submitted,

J. F. KEMP,
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Attorneys for Petitioner

APPENDIX

Section 88 of Title 18 U. S. C.; Criminal Code Sec. 37 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)"

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 103–104) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 19, 1946 (R. 104), and a petition for rehearing (R. 105–106) was denied January 22, 1947 (R. 107). The petition for a writ of certiorari was filed February 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The only question presented is whether the evidence is sufficient to sustain petitioner's conviction.

STATEMENT

On November 6, 1944, an indictment in one count was returned in the District Court for the Northern District of Georgia, charging that petitioner and Ernest Pruitt, Billie Bell, Richard Cole, Derrell Rogers and Corbett Wilson Prichard conspired to defraud the United States and to commit certain offenses against the internal revenue laws relating to the manufacture, transportation, possession, sale, and distribution of distilled spirits (R. 2–6). This charge related to the operation of certain illicit stills in Haralson and Douglas Counties, Georgia. The evidence as to these activities, particularly insofar as it shows petitioner's complicity, is set forth in the Argument, *infra*.

After a jury trial, petitioner and Pruitt were found guilty (R. 7, 92), and petitioner was sentenced to imprisonment for 18 months (R. 8–9, 92).[1] On a joint appeal to the Circuit Court of Appeals for the Fifth Circuit (R. 94–95), the convictions of petitioner and Pruitt were affirmed (R. 103–104).

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[1] Pruitt was sentenced to imprisonment for 15 months (R. 9–10, 92). Bell, Cole and Corbett Wilson Prichard stood trial with petitioner and Pruitt (R. 10). The court granted Corbett Wilson Prichard's motion for a judgment of acquittal

ARGUMENT

Petitioner contends that the evidence against him is as consistent with innocence as with guilt, and that, therefore, the district court erred in refusing to grant his motion for a judgment of acquittal (Pet. 3–9). That contention, however, is not supported by the record.

The relevant circumstances establishing petitioner's participation in the conspiracy are briefly as follows:

In 1943 and 1944, petitioner employed Pruitt, who lived about 3½ miles away, to farm some of his land (R. 79–80). On September 30, 1943, state and federal officers raided an illicit distillery in operation in Haralson County, Georgia. The officers arrived in the vicinity of the still about 5 o'clock in the morning and observed the apparatus being set up for operation and saw smoke coming from the still. While observing these activities, the officers heard the two men operating the still tell a third person that they had not had any breakfast and needed something to eat, and that they also needed some smoking tobacco. This third person then left the site of the still. Shortly thereafter, the officers seized the still and arrested Cole and Pruitt. One of the officers was

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at the close of the Government's case (R. 75–76). Although the transcript of the verdict included in the record (p. 7; see also p. 92) refers only to petitioner and Pruitt, petitioner states (Pet. 3) that all the defendants on trial except Corbett Wilson Prichard were found guilty.

then stationed on a nearby road to intercept any automobiles coming toward the still. About 20 or 25 minutes later, this officer stopped a car driven by petitioner at a point about 50 yards from the still. Petitioner was alone, and in the car the officer found canned goods, a loaf of bread and smoking tobacco. Petitioner was then taken by this officer to the scene of the still, and shortly thereafter he told Cole and Pruitt that he would see about making their bonds. (R. 44–49, 53–57.) In looking over the apparatus, the officers observed that the cracks between the planks in the sides of the tub were chinked with cotton (R. 57, 60–61, 67). They found a cotton ticket stub in the furnace of the still (R. 60, 63), which was traced to a local cotton warehouse. An employee of the warehouse testified that the stub related to a sale of 40 ounces of cotton he had made to petitioner on or about September 21, 1943 (R. 70–72). The officers also testified that they had seen a number of jugs and cases in petitioner's barn (R. 61, 69).

About noon on Sunday, October 17, 1943, state and federal officers raided another illicit distillery near the home of the defendant Bell in Douglas County, Georgia, and at that time they arrested Bell, Cole and Pruitt (R. 27–29). There was evidence that a cow belonging to a nearby farmer had died on or about October 9, 1943, and that Bell had inquired of the farmer whether he be-

lieved the cow had been poisoned from drinking mash at the still. About 9:40 a. m. on October 11, 1943, Pruitt went to the farmer and paid him $65 in currency, which had been agreed upon as compensation for the dead cow. (R. 33–37). The president of the only bank in Villa Rica, Georgia, a town near the sites of the illicit stills, testified that he did not recall that Pruitt had an account at the bank, but that petitioner did and that on October 11, 1943, a check for $65 was charged against his account (R. 40–41). A few months after the seizure of the Douglas County still, petitioner, who was previously unknown to the farmer, approached him and inquired about the loss of the cow and how it had happened (R. 37–39).

This evidence was amply sufficient to warrant the trial judge in submitting petitioner's case to the jury, for it showed that petitioner was a principal conspirator in the operation of the stills, if, indeed, he was not the dominant figure. It was fairly inferable from the officers' testimony that petitioner was the third person present at the Haralson County still when they had it under surveillance, and the further evidence as to the purchase of cotton used in the apparatus and petitioner's undertaking to secure bonds for Cole and Pruitt showed that he had an interest in that still. The evidence concerning payment for the dead cow definitely linked petitioner with the Douglas County still.

Petitioner claims, however, that Pruitt's testimony refuted the circumstantial case against him (Pet. 3, 4, 7–8). While Pruitt testified that he and one Rube Reeves, who he said had died prior to the trial (R. 81), controlled the stills and that petitioner had no connection with them (e. g., R. 76–78), the jury apparently chose not to believe Pruitt. That the jury was justified in rejecting his effort to exculpate petitioner is shown by the character of Pruitt's testimony. Thus, he testified that he had paid for the dead cow with money borrowed from Reeves (R. 77). Reeves was dead so that his story could not be checked. However, the testimony of the banker concerning the withdrawal from petitioner's account on the same day that Pruitt paid the farmer indicates that petitioner and not Reeves furnished the money. Pruitt also testified that petitioner did not sign any bond for him in the Haralson County matter (R. 84), but this was shown to be false, for a certified copy of Pruitt's bond introduced in evidence bore petitioner's signature as surety (R. 91).[2] Additionally, on cross-examination, Pruitt was unable to explain various details regarding the management of the stills with which, as the alleged controlling person, he should have been familiar. For example, he testified that he could

[2] This effective impeachment of Pruitt, of course, destroys petitioner's assertion that "no attempt was made to impeach Pruitt" (Pet. 4).

not remember what he had paid the other men working at the still (R. 78, 79), or where he had obtained certain equipment for the stills (R. 79).

The probative sufficiency of the testimony was a matter for the jury's determination (see, e. g., *Glasser* v. *United States*, 315 U. S. 60, 80), and the concurrence of both courts below in the sufficiency of the jury's verdict renders unnecessary any further review by this Court. See *United States* v. *Johnson*, 319 U. S. 503, 518.

CONCLUSION

The judgment below is clearly correct. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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